IN THE

Supreme Court of the United States

~~OCTOBER TERM, 1940.~~

~~[redacted]~~

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

against

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 75",
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF ON REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

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No. 14.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

—against—

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF ON REHEARING.

Statement.

A statement of the questions of law presented in the petition for a writ of certiorari and the references to the decisions of the lower courts in this case are to be found at pages 1 to 9, inclusive, of the brief submitted on behalf of the petitioner on the original hearing of this appeal in this Court. Here, as in that brief, the cargo owner, Commercial Molasses Corporation, will be referred to as "petitioner" and the New York Tank Barge Corporation, the chartered owner of Tank Barge "T. N. No. 73", will hereinafter be referred to as "respondent".

This case was orally argued before this Court on March 13 and March 14, 1941. On April 14, 1941, this Court entered an order as follows:

> "*Per curiam*: The judgment is affirmed by an equally divided Court."

Thereafter, petitioner sought a rehearing; and on the 28th day of April, 1941, this Court entered an order granting the petition for rehearing and directing that the judgment of the Court entered on the 14th day of April, 1941, be vacated and that the case be restored to the docket for a reargument and assigned for a hearing on Monday, October 13, 1941.

This brief is filed in relation to questions which members of the Court addressed to counsel during the first argument.

It was suggested in a question directed to counsel for the petitioner that the situation here involved was in substance that although the vessel had sunk in calm weather, without any external contact, yet the evidence adduced by the respondent contained a possible explanation for the sinking of the vessel, other than unseaworthiness, and hence the Circuit Court of Appeals might be justified in saying that the proof was insufficient to establish unseaworthiness. To illustrate the inquiry, one of the members of the Court suggested that, if a vessel should leave the port of New York in calm weather and later sink while she was being fired at by warships, then, notwithstanding the fact that there was no proof that any of the shots fired had struck the vessel, such evidence would be insufficient to permit a finding that the vessel was lost as a result of unseaworthiness. In reply to that suggestion, counsel for petitioner answered that this might be true under the particular facts stated by the inquirer, but that the situation thus stated is not analogous to that in the instant case.

The question assumed that it had been established by competent proof that the warships existed and were firing at the vessel. In the present case, on the contrary, the District Court found that the cause of loss alleged by the vessel owner, *i. e.*, negligence, or overloading, did not exist or was not established by competent or reliable proof. We submitted that the strongest case which could be made out for respondent here, is that there was a mere possibility (unsupported by any substantial evidence) that the sinking of the barge was due to negligence, *viz.*, overloading. We based this contention upon the finding of the District Court that the evidence was too speculative even to permit a finding that there had been overloading (Findings 32 and 33, R. 274, 275).

We do not overstate the case. In Finding 32 (R. 274) the District Court put the issue thus:

> "The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks."

In the next finding, *viz.*, Finding 33 (R. 275), the Court said:

> "There is no way of determining what part of this total [the quantity of molasses which had been pumped from the ship to the barge] went into the forward tanks and what part into the after tanks."

The case is not one where there is a mere want of proof of causal connection between negligence and a subsequent loss. It involves the more fundamental question as to whether there was any negligence at all. On this fundamental question the District Court held that no such finding could be made because

respondent's evidence was such that it left the question of the mate's negligence to "speculation" (Finding 34, R. 275) and that respondent's experts presented estimates and conclusions to support its contention that the mate was negligent which "were not well founded and could not form a satisfactory basis" for reaching a conclusion on the issue of negligence (Finding 35, R. 275). In Finding 39 the District Court directed attention to the fact that figures produced by one of these experts were based upon "an arbitrary assumption" (R. 277). In Finding 40 (R. 277-8) the District Court found as a fact that two statements of the mate, upon which respondent must rely if it wished to succeed in establishing that the mate was negligent, were not "reliable", and in consequence the Court was "left to sheer guesswork in attempting to draw any conclusion from his testimony" (R. 278). In Finding 41 (R. 278) the District Court found that one of the experts called by the respondent made an "erroneous assumption" (R. 278); that because the other expert based his testimony on that "erroneous assumption," his figures "are valueless and we are left further in the dark on the issue of overloading" (R. 278).

It is clearly stated by the District Court:

> "When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494. Petitioner alleges that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact" (R. 253).

In Conclusion 1 (R. 280), the District Court found unseaworthiness, and based that finding upon sinking in calm weather without any external contact. Al-

though the District Court referred to this conclusion as having been arrived at by the application of a presumption, that reasoning does not alter the fact that it was a finding. This Court in *Pendleton* v. *Bonner Line*, 246 U. S. 353, 354, treated similar evidence as proof of unseaworthiness, without any mention of a presumption.

To make the matter plain, in Conclusion 1 the District Court said: "I find that this loss resulted from unseaworthiness" (R. 280).

In view of these findings we submit that the Circuit Court of Appeals was wrong when it said:

> "We do not understand that the judge in declaring that he could not decide whether the barge was seaworthy, did not consider her unexplained sinking as part of the evidence before him; but that, on the contrary, having weighed everything, including her sinking when she did, he was left in doubt. He then took recourse to the presumption which he supposed to persist as a determining legal factor. So far as we can see, that was the exact equivalent of putting the burden upon the Barge Company to prove that the barge was seaworthy" (R. 297).

The Circuit Court of Appeals overlooked the statement of the District Court that respondent's evidence was so unsubstantial as to prevent it from basing any finding upon it. The Court also overlooked the fact that the District Court had based its finding of unseaworthiness upon the adequate proof of sinking without any external contact (Conclusion 1, R. 280). Consequently, when the District Court said that "*the best* that can be said of the state of the record is that the cause of the accident has been left in doubt" (R. 258), it did not mean that the cause of the accident *had been* left in doubt. All that it did mean was that even if the evidence of respondent should be

treated as substantial, then the best that could be said for it was that it showed that the cause of the sinking had been left in doubt. There is nothing in the opinion which suggests that this statement of the District Court was intended to modify its detailed findings that respondent's evidence was in fact unsubstantial and unreliable.

What the District Court did is far from placing the burden upon respondent to prove its barge seaworthy. The sinking in calm waters without more "required the inference" of loss from unseaworthiness and a judgment for petitioner. *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 171. The introduction by the respondent of unsubstantial and unreliable evidence did not alter the situation. The proof of unseaworthiness remained in full force, and could not be disturbed until respondent offered evidence which warranted a finding to the contrary. That respondent never did.

In the light of what was stated by Mr. Justice Black in his dissenting opinion in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, at page 176, it is not necessary to take "recourse to the presumption" "as a determining legal factor". The District Court had found upon adequate proof that the barge sank because she was unseaworthy. It had also found that respondent's evidence relative to overloading was unsubstantial. Hence, there was no evidence before the Court sufficient to overcome "the previous adequate proof" of unseaworthiness, and the District Court so found (Conclusion 1, R. 280). Therefore, the Appellate Court should not have substituted its opinion for that of the District Court as to the sufficiency of that evidence.

POINT I.

When petitioner proved that the barge "T. N. No. 73" sank in smooth water without any external contact, it made out a *prima facie* case of unseaworthiness. Under the decisions of this Court in *Del Vecchio* v. *Bowers*, 296 U. S. 280, and *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, this proof required a judgment for the petitioner unless the respondent could show some cause of loss other than unseaworthiness.

There was sufficient evidence to establish a *prima facie* loss by unseaworthiness when it appeared that the barge sank in calm water, without external contact. *Pendleton* v. *Benner Line*, 246 U. S. 353, 354; *S. C. Loveland Co.* v. *Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, 657.

In *Del Vecchio* v. *Bowers*, 296 U. S. 280, this Court, in considering the issue as to whether a death had occurred from an accidental cause or from suicide, held that the presumption that the death was from an accidental cause remained until the employer had introduced evidence sufficient to justify *a finding* of suicide. Applying that test here, we submit that the *prima facie* case of unseaworthiness controlled the decision, because the District Court was unable, by reason of the insufficiency of the evidence introduced by respondent, to make any finding which would dislodge that *prima facie* case. The respondent in this case had merely introduced evidence which at best left in doubt the question as to whether or not there had been overloading (Conclusion 2, R. 280). It had failed to introduce any "evidence sufficient" to justify a finding of overloading (Finding 28, R. 273). It left the Court "in the dark on the issue of

overloading" (Finding 41, R. 278). In these circumstances, the finding that the sinking was caused by unseaworthiness was correct. To put the matter in the words of this Court in *Del Vecchio* v. *Bowers*, *supra*, the presumption remained in the case, for its "office is to control the result where there is an entire lack of competent evidence" to the contrary (296 U. S. at p. 286).

We have cited in our principal brief (Brief, pp. 14-15) many cases to show that proof of a sinking in calm weather without any external contact is sufficient to establish that a vessel sank because of unseaworthiness. Respondent in its brief realized that proof of sinking in calm weather, without any explanation, is sufficient to establish unseaworthiness, because at pages 3-6 of its brief there is an attempt to establish the explanation of overloading. The difficulty with this argument is that it asks this Court to make a finding that there was sufficient evidence to establish overloading when the District Court found that the evidence was insufficient to establish that fact. An Appellate Court, although an appeal in admiralty is treated as a trial *de novo*, will not disturb findings of a trial court except on the clearest evidence.* This is especially true in this Court,

* In *The Andrea F. Luckenbach*, 78 F. (2d) 827, 828, the Circuit Court of Appeals for the Ninth Circuit expressed the rule thus: "the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the Appellate Court unless clearly against the weight of the evidence." See also

The Lake Galewood (C. C. A. 1), 66 F. (2d) 83;
United States Gypsum Co. v. *Conners Marine Co.* (C. C. A. 2), 119 F. (2d) 689;
Doll v. *Scott Paper Co.* (C. C. A. 3), 91 F. (2d) 860;
The Frances (C. C. A. 4), 101 F. (2d) 30;
The William A. Paine (C. C. A. 6), 39 F. (2d) 586;
The Eastland (C. C. A. 7), 78 F. (2d) 984;
The Redwood (C. C. A. 9), 81 F. (2d) 680;
Baton Rouge & B. S. Packet Co. v. *George* (C. C. A. 5), 128 F. 914.

where, as is the case here, no application for certiorari has been made by a party which attacks the findings of a trial court. See *Oxford Paper Company* v. *The Nidarholm*, 282 U. S. 681, 684.*

After deciding *Del Vecchio* v. *Bowers*, *supra*, this Court dealt with the same problem in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161. That case involved a claim against the New York Life Insurance Company under a double indemnity feature of a policy of life insurance which excluded recovery in cases where death resulted from suicide. The deceased died by gun shot. The complaint in the suit alleged that the death of the insured resulted solely through external, violent and accidental means and did not result from self-destruction. The defendant's answer admitted that the plaintiff was entitled to recover the amount mentioned on the face of the policy; and the defendant deposited that sum in court. It denied, however, that death resulted from bodily injury effected through accidental means and that the plaintiff was entitled to a double indemnity.

This Court held that because the evidence was sufficient to sustain a finding that death was not due to accident, there was no foundation of fact for the

* But in the present case the evidence fully supports the District Court and is against respondent's contentions. The evidence is that there was water in the after peak tank (R. 115) where it was not supposed to be (R. 96), and there was no explanation of how it got there (R. 272). There was, however, proof from respondent's witnesses that the barge contained about 500 slack rivets (R. 118, 156, 158). Petitioner's witness said that there were some 1500 short rivets in the barge (R. 193-194). Thus there was in this case substantial evidence to support the finding of unseaworthiness and there was no evidence to the contrary of sufficient persuasiveness to support a finding that negligence or overloading existed. The evidence is more fully discussed at pages 3 to 8 of our reply brief.

application of the presumption; and that the case stood for decision by the jury upon the evidence, unaffected by the presumption that the death resulted from accidental cause. The Court said (p. 171):

> "Upon the fact of violent death without more, the presumption, *i. e.*, the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travellers' Ins. Co.* v. *McConkey, supra*, 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. *The evidence being sufficient to sustain a finding that the death was not due to accident*, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed" (303 U. S. at p. 171). (Italics ours.)

Applying this law to the present case, since respondent's evidence was "not sufficient" (Conclusion 1, R. 280) to sustain a finding that the sinking was due to negligence or overloading, there was a "foundation of fact for the application of the presumption" which arose from the proven fact that the barge had sunk in smooth water without any external contact.

POINT II.

The Circuit Court of Appeals was in error when it held that the District Court was unable to conclude that the loss was caused by unseaworthiness and that it was in doubt as to the cause of loss.

The Circuit Court of Appeals in referring to the decision of the District Court said:

> "The finding that the 'cause of the accident has been left in doubt', means, we take it, that the evidence as to whether or not the barge sank because of unseaworthiness, was so evenly matched that the judge could come to no conclusion upon the issue" (R. 293).

We respectfully submit that in making this statement the Circuit Court of Appeals was clearly in error. What the District Court did decide was that there was a *prima facie* case made out by the petitioner when it appeared that the vessel sank in calm water without external contact (Conclusion 1, R. 280). Then it decided that the evidence offered by respondent was so unsubstantial that it would not support a contrary finding. Unsubstantial evidence does not match substantial evidence. Certainly under these circumstances it is error to say that the evidence was "evenly matched". Nor did the District Court so say. In Conclusion 2 (R. 280) it said:

> "2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 280).

The language of this conclusion is lifted bodily from the opinion. A reference to the opinion, where the language can be read in its context, makes its meaning clear. This language follows a careful analysis of respondent's evidence relating to overloading. The Court states that this evidence was insufficient to permit a finding that the barge was overloaded and that the testimony of respondent's experts was based upon an erroneous assumption. The Court in its opinion goes on to say:

> "If it is an erroneous assumption, and I think it is, then all of Capt. Haight's figures are valueless and we are left further in the dark on the issue of overloading" (R. 258).

It follows this sentence with the following paragraph:

> "The best that can be said of the state of the record, is that the cause of the accident has been left in doubt. But this does not help the petitioner in these limitation proceedings—because from that doubt the law draws a presumption of unseaworthiness, which would deprive petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 258).

Reading this language in its context, it is apparent that, in the opinion of the District Court, the best that can be said for respondent's evidence is that it left *respondent's explanation* of the sinking in doubt. The Court then went on to say that this evidence, which did leave such doubt, did not help respondent. The District Court was quite right in making this statement, because the fact that the barge sank in calm weather, without external contact, "required the inference" of loss by unseaworthiness. This result is in accordance with *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 171, where this Court said:

"As the case stood on the pleadings, the law required judgment for plaintiff". And as this Court pointed out in that case, as well as in *Del Vecchio* v. *Bowers*, 296 U. S. 280, there must be evidence "sufficient to sustain a finding" that the loss was due to some other cause, in order to displace the inference or presumption. Mr. Justice Black in his dissenting opinion in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 176, followed a different path, but in this case the result is the same no matter what path is followed. Because there was adequate proof of unseaworthiness when it appeared that the barge sank in quiet waters without any external contact, then it was for the trier of facts to decide whether the evidence offered by respondent was substantial enough to overcome "the previous adequate proof". Here when the respondent failed to produce any reliable evidence to establish overloading, substantial evidence was lacking. Indeed, the evidence was so unsubstantial that the District Court stated that he was "left to sheer guess work in attempting to draw any conclusions from his testimony" (R. 278).

Mr. Justice Frankfurter inquired as to what the District Court meant by the reference to limitation of liability in Conclusion 2 (R. 280).

It must be conceded that this reference to limitation of liability is not altogether clear. The obscurity may be due to the circumstance that the case was a limitation of liability proceeding and for that reason two issues were presented, which should have been kept separate, *viz.*, (1) the issue of liability, and (2) the issue of whether liability, if established, was a limited liability. In an earlier case Judge Hough differentiated between these issues in a limitation proceeding thus:

> "The first duty of the court is to ascertain whether any liability exists, and if none exists

there is the end of the matter. But if liability be found, and loss or damage be shown, the second inquiry is whether such loss or damage was or was not 'done, occasioned or incurred without the privity or knowledge' of the shipowner petitioner" (*The Rambler*, 290 F. 791, 792 (C. C. A. 2).

See also:

The John H. Starin, 191 F. 800, 801 (C. C. A. 2);
The 84 H, 296 F. 427, 431 (C. C. A. 2).

The burden of proof on the issue of limitation of liability was upon the respondent*; and it may be possible that the District Court felt that when respondent had failed to establish its explanation of

* In *The Silver Palm*, 94 F. (2d) 776, 777, the Circuit Court of Appeals for the Ninth Circuit collected the authorities:

"Exoneration having been denied, the remaining issue is whether the Silver Line may limit its liability. The statute creating this right (46 U. S. C. A. §183) provides such relief only when the negligence causing the collision occurs without privity or knowledge on the part of the owner. The burden of proof of such absence of privity and knowledge is on the petitioning owner. *McGill* v. *Michigan S. S. Co.* (C. C. A. 9), 144 F. 788, certiorari denied 203 U. S. 593, 27 S. Ct. 782, 51 L. Ed. 332; *The Annie* (D. C.), 261 F. 797, 799, affirmed sub. nom. *People's Nav. Co.* v. *Toxey* (C. C. A. 4), 269 F. 793; *Henson* v. *Fidelity & Columbia Trust Co.* (C. C. A. 6), 68 F. (2d) 144, 145; *Petition of Diamond Coal & Coke Co.* (D. C.), 297 F. 242, affirmed (C. C. A. 3), 297 F. 246, and certiorari denied *Diamond Coal & Coke Co.* v. *Hazelwood Dock Co.*, 265 U. S. 595, 44 S. Ct., 638, 68 L. Ed. 1197; *In re Reichert Towing Line* (C. C. A. 2), 251 F. 214, 217, certiorari denied *Reichert Towing Line* v. *Home Ins. Co.*, 248 U. S. 565, 39 S. Ct. 9, 63 L. Ed. 424; *In re P. Sanford Ross* (C. C. A. 2), 294 F. 248, 257; *The 84-H* (C. C. A. 2), 296 F. 427, 432, certiorari denied *Randolph* v. *Bunker Co.*, 264 U. S. 596, 44 S. Ct. 454, 68 L. Ed. 867; *Christopher* v. *Grueby* (C. C. A. 1), 40 F. (2d) 8."

sinking, *viz.*, overloading, the issue had to be decided against respondent in any event "in these limitation proceedings", because of the burden resting upon respondent to establish its right to limitation.

Another explanation of the reasoning of the District Judge is found in the language of the very next paragraph of the opinion. It reads:

> "On this question of limitation of liability, there is a further point to be considered" (R. 258).

The point referred to was that the contract of affreightment was a personal contract which under the decisions of this Court in *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, and *Pendleton* v. *Benner Line*, 246 U. S. 353, prevented the respondent from limiting liability (R. 258). To the cases cited by the District Court should be added the case of *Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82. The District Court's conclusion on this point is found in Conclusion 3 (R. 280).

It seems apparent that the District Court, having found in Conclusion 1 (R. 280) that the loss resulted from breach of the vessel owner's warranty of seaworthiness, then thought proper to say in Conclusion 2 (R. 280) that because of this fact the vessel owner was deprived of the right to limit liability since the contract which it had breached was its personal contract, under the principle of the decision of this Court in *Pendleton* v. *Benner Lines*, 246 U. S. 353, cited by the District Court with a statement of the principle in its Conclusion 3 (R. 280).

POINT III.

Mere contradictory evidence, insufficient to support a finding, was not sufficient to warrant the Circuit Court of Appeals in disregarding findings of the District Court that the loss was due to unseaworthiness. The District Court as the trier of facts—not the Appellate Court—should decide when there has been substantial evidence which overcame the previous adequate proof.

To hold otherwise is in effect to overrule the decision of this Court in *Pendleton* v. *Benner Line*, 246 U. S. 353. There, speaking through Mr. Justice Holmes, this Court held that, in a case where cargo owner's only proof was a showing that a vessel sank without any external contact, the District Court, as a trier of facts, correctly found that a loss was caused by unseaworthiness, notwithstanding that the vessel owner offered testimony as to the good condition of the vessel on sailing, of bad weather, and that the vessel struck a floating object. The District Court held that the testimony as to good condition on sailing was not sufficient, in view of its finding that there was no bad weather, to overcome the *prima facie* case that the vessel sank because of unseaworthiness. The testimony as to the vessel striking a floating object was held to be unreliable, and, therefore, not sufficient to rebut the presumption of unseaworthiness. In the instant case, the District Court likewise found that the vessel owner's testimony as to the mate's negligence was unreliable, and that respondent's expert testimony as to alleged overloading based upon it was insufficient to cause the Court to modify its conclusion that the barge sank from unseaworthiness. If this Court had considered in *Pendleton* v. *Benner Line* that the mere offer of proof as to a possible contrary explanation was sufficient to prevent a finding by the

District Court that the vessel had sunk because of unseaworthiness, it would seem that the result reached in that case would have been otherwise from that actually arrived at.

In the dissenting opinion in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 176, Mr. Justice Black states that in cases such as that now before this Court, the issue whether or not evidence is substantial should be determined by a jury, the trier of the facts. The trier of the facts here, the District Court, held that respondent's proof was unsubstantial. Then, since proof of sinking without any external or violent cause has uniformly been held to establish loss by unseaworthiness,* mere contradictory evidence, found by the trier of facts to be unsubstantial, was insufficient to overcome that original adequate proof.

> "The *jury*—not the *judge*—should decide when there has been 'substantial' evidence which overcomes the previous adequate proof" (303 U. S. at p. 176). (Italics are Mr. Justice Black's.)

Here the District Court, which stood in the position of the jury,** decided that there had not been any such substantial evidence (Conclusion 1, R. 280) which overcame the previous adequate proof of unseaworthiness, *viz.*, sinking in calm water, without external contact. Therefore, the Appellate Court should not have disturbed the finding of the District Court (the equivalent in Admiralty of the verdict of a jury). When the District Court made its decision, we submit

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* See cases cited in our principal brief, pages 14-15.

** There are no juries in Admiralty. But see *Barlow* v. *Pan Atlantic, S. S. Corp.* (C. C. A. 2), 101 F. (2d) 697, 698, where the Court said:

> "It is elementary that the weight of the evidence on an issue determined by the trial judge is not to be reviewed by an appellate court."

that the Appellate Court could not set it aside merely because the Trial Court had said that the best that can be said of the record, which consisted of the vessel owner's attempt to overcome the presumption of unseaworthiness, is "that the cause of the accident has been left in doubt" (R. 280). This statement indicated no doubt in the mind of the Court as to the cause of the loss, for the Court had already reached the conclusion that "this loss resulted from unseaworthiness" (Conclusion 1, R. 280). When the trier of the facts found that the evidence adduced by the respondent could do no more than leave the cause of the accident in doubt and resolved that doubt against respondent, because respondent's evidence left the matter to speculation (Finding 34, R. 275), and because respondent's evidence was "not well founded and could not form a satisfactory basis for determining" (Finding 35, R. 275), and because the testimony of respondent's leading fact witness was unreliable and a guess (Finding 40, R. 277), that finding of fact of the trial court should not have been disturbed by an Appellate Court.

Certainly a verdict reached on "previous adequate proof" that the boat was unseaworthy because she sank in calm water without any external contact, should not be set aside on any such unsubstantial evidence as this. No more should the finding of the District Court—the trier of the facts—be set aside. But that is exactly what the Circuit Court of Appeals did do, and it is that error which we have asked this Court to correct. Compare what was done in *Pendleton* v. *Bonner Line*, 246 U. S. 353, 354, where, on reasoning almost identical with that of Mr. Justice Black in the dissenting opinion in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 176, this Court held a vessel unseaworthy, with what the Circuit Court of Appeals did in this case.

POINT IV.

The contract did not require the petitioner to insure against the respondent furnishing an unseaworthy vessel when respondent had expressly warranted that the vessel was seaworthy.

In addition to the question of law as to the scope and effect of the presumption of seaworthiness, this case also presents for decision the question as to whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship (Petition for Certiorari, p. 10; Petitioner's Main Brief, pp. 40-53). On this point, in answer to a suggestion by Mr. Justice Black during the prior oral argument that *The Caledonia*,* 157 U. S. 124, 132, established that the warranty of seaworthiness in a contract of carriage protected the cargo owner until the vessel breaks ground, counsel for respondent stated that this law did not apply in the present case because that was "old law".

In *The Toledo*, not yet officially reported but reported in 1941 A. M. C. 1219, the Circuit Court of Appeals for the Second Circuit discussed the rule of construction considered in *The Caledonia*, 157 U. S. 124, and in *The Carib Prince*, 170 U. S. 655, and said at page 1221:

> "The principles of construction discussed in *Caledonia, supra*, would seem to be equally applicable when the warrantor is a private carrier."

The suggestion made during argument that the rule in *The Caledonia* was inapplicable here because the contract of carriage here involved related to private

* See our principal brief, pages 41-44.

carriage and not common carriage is, therefore, without merit. In *Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82, 88, this Court held a private carrier to full liability under a warranty of seaworthiness, notwithstanding the fact that the warranty was only implied—not expressed as it is here (Finding 42, R. 278)—for loss resulting from the scow capsizing and dumping her load during loading.

We have shown in our principal and reply briefs* that the contract of carriage did not in any event require that your petitioner supply respondent with any P. and I. (*i. e.*, liability) insurance, but required your petitioner to "insure the cargoes" carried, for the account of the respondent, only to the extent called for by the proper interpretation of the contract. In determining whether there was any intention to extend the obligation of providing insurance so as to cover unseaworthiness during loading, the whole agreement between petitioner and respondent contained in the contract of carriage must be considered—*Nelson Line, Ltd.* v. *James Nelson & Sons, Ltd.*, (1908) A. C. 16,—especially the context of the clause exempting the carrier from loss "in respect of which insurance has been or could have been effected". We there showed that the provision relating to insurance, as was said in *The Nelson Line* case, was not sufficient to permit a shipowner to divest himself of the obligation to supply a seaworthy ship. That obligation "may be negatived only by express covenant". *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82, 88. See also *The Caledonia*, 157 U. S. 124, 137, and *The Carib Prince*, 170 U. S. 655, 659.

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* See our principal brief, pages 45-52 and Reply Brief, pages 18-23.

A further discussion of that subject is unnecessary. The only "new" provision in the policies here involved reads:

> "The seaworthiness of the vessel as between the assured and the underwriters is hereby admitted" (R. 238).

These words, however, do not assist respondent; for, as was said in *The Turret Crown*, 297 F. 766, 780 (C. C. A. 2), cert. den. 264 U. S. 591:

> "The phrase 'as between the assured and the assurers' prevented the carrier from taking any benefit from the admission of seaworthiness. The words must be taken in their true meaning. The shipper and his underwriter are at liberty to exclude the carrier from any participation in the insurance. The underwriter may provide with the shipper that if the vessel is unseaworthy he will protect him, but not release the carrier. The British insurance is paid under the loan receipt, and there is no waiver of the underwriter's claim against the carrier" (297 Fed. at p. 780).

The policy here, as in *The Turret Crown, supra*, provided that the carrier should not be released from liability under its contract (R. 279), and the loss was settled as a loan (Finding 46, R. 280). The method of insurance here used was exactly like that in *The Turret Crown*, and there was not any indication in either the contract of affreightment or in the policy of insurance that the parties intended to insure the carrier against the unseaworthiness of its own vessel. There was nothing in this so-called new method of insuring which suggests that such insurance was in any way to be for the benefit of the shipowner. In fact, the express language of the parties is to the contrary. Nor is there anything in the language of the contract of carriage which suggests that the cargo

owner was obliged to insure against the carrier's failure to perform his personal warranty to supply a seaworthy ship.

As this Court pointed out in *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149, it is desirable that shippers be reimbursed by their underwriters without awaiting the outcome of litigation against carriers and without waiving their right against such carriers.

CONCLUSION.

The decisions below should be reversed and a decree entered awarding the cargo owner its damages, with interest and costs.

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